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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 237

LUTHER F. GRANT and SIRRKA V. GRANT,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Luther F. Grant and Sirrka V. Grant, petitioners, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Northern District of New York dismissing their petition for the suppression of evidence and the return of certain papers, books and records obtained by an alleged illegal search and seizure.

Opinion Below

The opinion of the court below (28-32)* is not yet reported. It is unofficially reported in 8 AFTR 2d 5038. Other opinions of the Court of Appeals in this case, but not involved in this petition are reported in 282 F. 2d 165 (1960) and 283 F. 2d 582 (1960).

*References without a letter are to appendix to this petition. References to Petitioners' appendix in the court below are "1a".

Jurisdiction

The judgment of the Court of Appeals was entered on June 19, 1961 (33). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

Constitutional Provisions, Statutes and Regulations

Amendments 4 and 5 of the United States Constitution, Sections 7602 and 7604(a) of Title 26 of the United States Code and 26 C. F. R. ¶601.105(b) are set forth in the appendix.

Questions Presented

1. Where a taxpayer has made his books and records available to an internal revenue agent for the purpose of ascertaining his correct civil tax liability for specific years (as the taxpayer is required to do by 26 U. S. C. Sections 7602, 7604 and 7605) is a special agent of the Intelligence Division required to make clear to the taxpayer when he seeks to examine those same books and records in the taxpayer's home that he is a criminal investigator looking for evidence of a criminal offense?

2. Where the internal revenue agent has suspended his civil investigation, referred the case to the Intelligence Division for a criminal investigation, and a special agent proceeds to obtain books, records, and other information from the taxpayer in his home, without a search warrant and not incident to a lawful arrest, is the burden on the government to show by clear and positive evidence the taxpayer unequivocally and specifically consented to the search, knowing the special agent's purpose?

3. Where a taxpayer testifies he considered any request by an internal revenue agent or special agent a "demand" or "directive" with which he was obligated to comply, that he did not know the difference in function between a revenue agent and a special agent, and his testimony is accepted by the District Court as honest, was his submission of books and records to the special agent a voluntary waiver of his constitutional rights under the Fourth and Fifth Amendments?

4. Do the following circumstances constitute affirmative acts of stealth, fraud and deceit by the government, requiring the suppression of evidence:

(a) the internal revenue agent having suspended his civil investigation, introduced a special agent in charge of a new criminal investigation of the taxpayer, as one who would "assist" the revenue agent on the case;

(b) the special agent over a two-year period from time to time stated to the taxpayer that he would discuss the "tax figures" when he completed his investigation;

(c) the special agent discussed the requirement for interest on deficiencies while inducing the taxpayer to sign waivers of the statute of limitations for civil tax assessments;

(d) the special agent copied the taxpayer's books and records without his permission; and

(e) the special agent did not at any time inform the taxpayer that his function in the investigation was to seek evidence for the purpose of criminal prosecution.

Statement

The petitioners are Luther F. Grant, a physician and surgeon, and his wife, Sirrka V. Grant, also a physician, who practices her profession under her maiden name Dr. Vuornos. (For convenience, petitioners will be referred to by their professional names "Dr. Grant" and "Dr. Vuornos.") Since 1944 they have had their medical offices in their home at 12 Chestnut Street, Liberty, New York (49a-50a).

In May, 1955 Internal Revenue Agent Morris S. Solomon commenced an examination of petitioners' joint federal income tax returns for the calendar years 1952, 1953 and 1954 (32a, 106a). This was the first internal revenue examination of petitioners' tax returns in about 14 years (52a). Morris Solomon resigned in January, 1956 before completing his examination and making his report (54a).

Internal Revenue Agent Anthony R. Aiello was assigned to continue the examination (Ex. 6, 54a, 108a). On February 1, 1956 he wrote to Dr. Grant requesting him to have his books and records available for examination (Ex. 9, 110a). Thereafter, until October, 1956, Aiello made several visits to Dr. Grant's office, and examined his books and records (20a-21a, 55a-56a).

Both Solomon and Aiello told Dr. Grant and the girls employed in the office that their records did not accurately record their income (20a-21a, 55a). Aiello suggested to Dr. Grant that he should have an accountant to prepare future returns (22a, 55a). Early in 1957 when it came time to prepare the 1956 income tax return, Dr. Grant followed Agent Aiello's advice and engaged an accountant (56a-57a).

On January 28, 1957 Agent Aiello suspended his examination and referred the matter to the Intelligence Division for consideration whether to conduct a fraud investigation (12a). On January 30, 1957 Special Agent Charles J. Howland was assigned to make an investigation of petitioners' tax returns to determine whether they had committed any criminal violations (12a-13a).

On March 26, 1957 Howland made his first visit to petitioners' office, accompanied by Aiello. Revenue Agent Aiello introduced Howland as a special agent "who was going to help him with the audit of my taxes and that they hoped between the two of them they could get the thing finished up" (58a, 79a, 81a). Dr. Grant was pleased, as two agents had worked on the examination a couple of years, and now with a third one he hoped it could be finished up (58a, 80a). They asked him questions about personal background and general questions about finances. At no time did Howland inform Dr. Grant it was his function to investigate and determine whether he had committed a crime against the revenue, or whether there had been fraud. There was no mention of "constitutional rights", "self-incrimination" or "crime" (70a). Dr. Grant did not know the difference between Aiello's and Howland's function, and understood he was obligated to give them whatever information they demanded. Any request was considered a "directive" (71a, 83a). Thereafter, Howland visited petitioner's office several times without Aiello and obtained books, records and other information.

On June 3, 1959 the Intelligence Division sent Dr. Grant a letter informing him that it was considering recommending that criminal proceedings be instituted against him (Ex. 28, 119a). Dr. Grant testified that when he received the letter of June 3, 1959 he was shocked. Until the receipt of this letter, over two years after Howland had begun his

investigation, Dr. Grant did not become aware that Howland was examining his books and records to determine whether he should be criminally prosecuted (69a, 88a).

On February 26, 1960 petitioners filed in the United States District Court for the Northern District of New York, a petition for the suppression of evidence and the return of certain papers, books and records obtained by an illegal search and seizure pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. Since the petition was filed prior to a complaint or indictment, it is an independent civil action governed by the Federal Rules of Civil Procedure.* On October 17, 1960 petitioners filed an amended petition. On December 5, 1960 the United States filed an answer to the amended petition, which admitted the Special Agent had no search warrant (14a).

The amended petition alleged that Dr. Grant "never had heard and did not know the difference between the functions and responsibility of a revenue agent and a special agent. That he did not know and had not previously heard that special agents have the function of seeking evidence for criminal prosecutions" (5a-6a). The amended petition further alleged that "at no time did petitioner give to said agents, or authorize his employees to give to said agents any of the books, records, and other papers owned by petitioner and his wife, for purposes of any criminal investigation, nor did petitioner voluntarily waive any rights granted to him by the Constitution of the United States" (9a).

The amended petition specifically alleged that Agent Aiello demanded that plaintiffs make available their books

* *Hoffritz* v. *United States*, 240 F. 2d 109 (9th Cir. 1956), *Lapides* v. *United States*, 215 F. 2d 253, 254 (2nd Cir. 1954), *Russo* v. *United States*, 241 F. 2d 285 (2nd Cir. 1957), cert. den. 355 U. S. 874.

and records (as he had a right to do under Section 7602 of the Internal Revenue Code of 1954) and that petitioner turned over his records because he was obligated by law so to do (¶4, 4a). It alleged that petitioner made his records available to Agent Howland because he believed he was obligated to do so (¶10, 6a).

The hearing on the amended petition was held on December 5th and 6th. The testimony supported the allegations of the amended petition (81a-83a, 88a). There was no attack on the credibility of petitioners' witnesses and no conflict in the evidence. The issue was one of law. At the conclusion of the presentation of the petitioners' case Judge James T. Foley granted the government's motion to dismiss the petition without specific findings of fact or conclusions of law (104a).

In affirming, the Court of Appeals ruled that no search was established, no compulsion was shown, and any question of waiver of constitutional rights had not been plainly presented (32).

REASONS FOR GRANTING THE WRIT

1. The issue is important, since the ruling of the court below is applicable to all taxpayers—and therefore to millions of persons.

The gist of the holding is that where an internal revenue agent makes an examination of a taxpayer's records in order to determine his civil tax liability for specific years, and a special agent then commences an investigation of that taxpayer to determine whether he should be criminally prosecuted, there is no obligation upon the government to inform the taxpayer of the special agent's function and purpose.

The court below ruled that there is no obligation upon the special agent to obtain a search warrant or to advise

the taxpayer of his constitutional privilege against self-incrimination.

Since special agents almost *never* bother to obtain search warrants (although Congress has expressly given such authority to special agents by Section 7608 of the Internal Revenue Code of 1954) this Court should determine what constitutes a waiver of constitutional rights against a search without a warrant, and self-incrimination, and a consent to such a waiver.

This case illustrates a serious evil in criminal investigative procedures in income tax cases. It demonstrates how special agents take advantage of the ignorance of taxpayers to obtain evidence for criminal prosecutions, depriving them of constitutional protection afforded to ordinary criminals.

The Intelligence Division makes thousands of investigations each year. The facts in this case are typical of most investigations. In 1955 a revenue agent commenced a "routine" investigation of petitioners' *civil* income tax liability for the years 1952, 1953 and 1954. After two years of investigation, during which time the petitioners were requested to sign a waiver of the statute of limitations against *civil* assessment, the revenue agent brought to petitioners' home a special agent on March 26, 1957. The record is uncontradicted that Revenue Agent Aiello told Dr. Grant that Special Agent Howland was going to *help Aiello* with the audit of his taxes, and they hoped between the two of them that they could get it finished (58a, 79a). This was confirmed by an employee (28a). There is no evidence in the record that Howland described his true function. The record shows affirmatively that during the entire period of over 2 years of Howland's investigation, both Dr. Grant and the employee thought his function was the same as Aiello's (28a, 32a, 69a, 71a, 79a, 81a-86a).

This Court should clearly understand what evidence petitioners attempted to suppress. The evidence involved here is that given to Howland *after* Aiello told Dr. Grant Howland was going to assist Aiello, on March 26, 1957. It may be that Aiello unlawfully seized some evidence prior to that date, but petitioners were deprived of the opportunity to learn whether such was the fact. Petitioners' attempts to take the depositions of Aiello and Howland, and to examine their reports, memoranda, etc. were blocked by the government (R. 305, 309). The only copies of petitioner's records in the government's possession are those made by Howland after the false statements made to Dr. Grant on March 26, unless Aiello surreptitiously copied petitioners' records without their knowledge or consent.

This Court should resolve a sharp conflict between two basic rights—(1) the right of the government to collect taxes, and (2) the right of the taxpayer against unlawful search and seizure and self-incrimination under the Fourth and Fifth Amendments to the Constitution. The problem involved in interpreting, enforcing and protecting these rights has resulted in inconsistent and conflicting court decisions.

Some courts have failed to realize the great distinction between the function of an Internal Revenue Agent and a Special Agent. The Constitution gives the government the right to collect taxes and Congress has enacted statutes containing various provisions to enable the Commissioner of Internal Revenue to investigate both civil tax liability and criminal offenses against the revenue. These are two separate and distinct functions, and he has set up separate and distinct divisions to carry out these functions. The function of investigating to determine civil tax liability has been assigned by the Commissioner to Internal Revenue Agents, who are in the Audit Division. 21 F. R. 10418.32 (12/28/56, 26 C. F. R. 601.105 (b)).

The sole function of a Special Agent in the Intelligence Division of the Internal Revenue Service is to seek evidence of crimes. He has no concern whatsoever with the amount or collection of any additional tax, these being strictly the concern of the revenue agent. He is exactly the same as any other Treasury Agent who may seek evidence of narcotics, counterfeiting, alcohol tax, customs violations, etc. A special agent is a criminal law enforcement officer, just like any state or municipal detective or policeman. He, like any other government agent who enforces the criminal law must obtain a valid search warrant.

In *United States* v. *Sclafani*, 265 F. 2d 408 (2d Cir. 1959) the Court assumed that a single investigation, lawfully commenced for solely civil purposes had "changed its course" to criminal (p. 414). That might be so when an Internal Revenue Agent engaged in a purely civil audit discovers evidence of crime and pursues it. But when a special agent enters the picture, it is an entirely new investigation, for a new purpose, and the civil tax liability is no longer involved. The manual specifically provides that the civil investigation is suspended, and the government's answer here admits the original examination was suspended (12a, 122a).

If the Commissioner attempted to have one agent investigate both civil tax liability and criminal offenses, he would create a difficult constitutional problem, because the preliminary stages of a criminal investigation must be pursued in strict obedience to the Constitution and laws of the United States. *Abel* v. *United States*, 362 U. S. 217, 226, 240 (1960). By assigning separate functions to separate divisions, he has avoided the problem. The courts should not re-create a problem by disregarding this fundamental separation of functions.

In criminal income tax investigations there has been a growing practice of evading the limitations placed by law on the actions of criminal investigators. This has been accomplished by misusing rights granted for purely civil purposes to obtain evidence for criminal cases. The failure of some courts to recognize that such illegal practices are leading to a nullification of constitutional immunities is causing considerable concern among lawyers.

W. V. Ludlam, "Tax Fraud Investigations: A Plea for Constitutional Procedures," 43 *A. B. A. Journal* 1009 (November, 1957) stated:

> "* * * The Intelligence and Audit Divisions are separate units within the District Director's office and, in the main, have different and separate duties, functions and purposes. However, this existence of two different types of investigative agents and this difference in their functions are not generally known or understood by the average taxpayer. * * * This lack of knowledge or this misconception by the average taxpayer is one reason why certain subterfuges or misrepresentations, occasionally attempted by Special Agents, should be dealt with strongly by the courts under the Fourth and Fifth Amendments" (p. 1010).

Redlich, in "Searches, Seizures, and Self-Incrimination in Tax Cases," 10 Tax Law Rev. 191 (1955) summarized the issue as follows:

> "* * * But when the government transforms a purely civil investigation into a criminal inquiry without warning the potential defendant of his constitutional right of silence, it would appear that the tenuous line between clever detection and the unreasonable pursuit of evidence has been crossed.

> "True, warning a taxpayer that he is talking to a criminal investigator would hinder law enforcement; all constitutional safeguards are vulnerable to the same criticism. But if, in the final analysis, the only proof of guilt remains in the taxpayer's possession, then it is merely restating a fundamental concept of American law to say that such information must be obtained voluntarily and without deception, or not at all" (pp. 211-212).

Other legal articles discussing the problem are:

> Kostelanetz, "Bill of Rights Not Repealed for Taxpayers," 34 *Taxes* 16 (1956);
> Doyle, "Searches and Seizures and the Duty to Warn in Fraud Investigations," *NYU 14th Ann. Inst. of Fed. Tax*, p. 1317 (1956);
> Avakian, "Searches and Seizures," *NYU 17th Ann. Inst. of Fed. Tax*, p. 531 (1959);
> Lipton, "The Taxpayer Under Fraud Investigation," 47 *A. B. A. Journal* 265 (March 1961).

This realization that many taxpayers are being deceived through their ignorance, and trapped into giving evidence against themselves has resulted in warnings from others. Such a warning was given to doctors by Joseph J. Berger, C. P. A. in "Will You Be Ready for a Tax Audit?," 37 *Medical Economics* 86 (February, 1960), where he said:

> "Cut off the audit also if the T-man's credentials contain the words 'Special Agent.' Such agents are always used in cases of suspected tax fraud. Get in touch with your lawyer—not your accountant—and let him handle the situation" (Ex. 34A, 121a).

The issue now before this Court is of tremendous public importance. The ruling is applicable to every taxpayer—

and therefore to millions of persons. Should not this great number of ordinary citizens be accorded the same protection from the courts as reputed criminals? This strikes at the fundamental relationship between the government and the people. If every taxpayer must worry when a revenue agent comes around that he may end up as a defendant in a criminal trial, the collection of taxes will be seriously impaired. If the courts do not enforce the distinction between a civil tax investigation and a criminal investigation, then all lawyers and accountants will have to advise their clients never to give the government any information, because there is *always* danger of self-incrimination. The present system of tax collection would break down.

In the court below, petitioners contended that when a special agent interrogates a taxpayer, the agent should always be *required* to make known to the taxpayer that his function is to determine whether a crime has been committed. This would make clear to a taxpayer that the special agent is not simply endeavoring to determine whether the taxpayer owes additional taxes. This requirement is especially necessary when a revenue agent has been making a concededly civil audit, and a special agent is assigned. The government should be *required* to make clear that a new investigation has commenced, and that the obligation of Section 7602 is no longer applicable.

Why should not courts require *clear* evidence that a taxpayer was *aware* that a new, criminal investigation was involved. Congress has specifically authorized special agents to obtain search warrants. The revenue agent has described for the Intelligence Division the records of the taxpayer so that the special agent has all the information necessary to apply for a search warrant. Serving a search warrant would not only eliminate any question of the special agent's right to search, but would serve as a specific

warning to a taxpayer that something more than civil liability was involved.

Why should not special agents obtain a *written* consent to a search waiving constitutional rights? The Commissioner has all kinds of forms he has no hesitancy in asking taxpayers to sign—waiving statute of limitations against assessments, waiving notice of assessments, etc.—why not a waiver of constitutional rights? If the Commissioner admits—as he must—that the taxpayer does have constitutional rights, but claims he conciously and knowingly waived them, why not get the waiver in writing? The revenue agent writes the taxpayer a letter advising the purpose of his investigation. Why should not the special agent do the same?

The Court of Appeals recognized the merit in this contention (30-31):

> "It would of course be far preferable, so that it may be made certain that the choice of the taxpayer be an informed choice, that written warning be given when the civil audit is suspended as such, and the investigation becomes one to determine whether criminal or civil fraud penalties should be sought by the government. This would not only protect the taxpayer's constitutional rights, but also obviate much of the delay in tax cases caused by such motions as the one before us."

Even though the Court of Appeals avoided the task of clarifying the confusion in this area, this Court has supervisory power over federal enforcement agencies, and has not hesitated to restrain them when necessary to enforce the rules governing searches and seizures. *Rea* v. *United States*, 350 U. S. 214 (1956).

2. The decision below conflicts with applicable decisions of this Court.

In its opinion the Court of Appeals ignored most of the cases cited by petitioners and simply relied on its own opinion in *United States* v. *Sclafani*, 265 F. 2d 408 (2nd Cir. 1959) cert. den. 360 U. S. 918, and *Turner* v. *United States*, 222 F. 2d 926 (4th Cir. 1955) cert. den. 350 U. S. 831.

The confusion of the courts in this area is illustrated by these two cases. In *Turner* the Fourth Circuit relied heavily upon Judge Dimock's opinion in *United States* v. *Wolrich*, 119 F. Supp. 538, 540 (S. D. N. Y. 1954), denying a motion to suppress evidence before trial. After the jury disagreed at the trial, the defendant renewed the motion to suppress, based upon evidence brought out on cross-examination of the agents at the trial. When the distinction between the functions of internal revenue agents and special agents had been pointed out to him, Judge Dimock reconsidered his earlier denial of the motion to suppress evidence. He stated (129 F. Supp. 528, 529):

> "The new evidence consisted of the official manual of instructions of the Internal Revenue Department. From this and from the testimony of the revenue agents, it appears that, when the alleged statement was made that the examination was a routine one, it was part of what was denominated in the manual a 'Joint Investigation' conducted by a special agent, who is stated to be responsible for the criminal features of the case and for the procurement of proper proof to establish the criminal charge should the prosecution be authorized, and a revenue agent, who is responsible for the audit features of the case and for the preparation of the record of the proof to support the ad valorem addition to the tax . . .

> Upon this record, it seems to me that I can no longer, as I have in the past, rest upon the conclusion that the examination was a routine examination."

The government has made a determined effort in case after case to keep from the courts evidence of distinction between the functions of the revenue agent and a special agent. In the instant case the government endeavored to have a writ of mandamus issued to prevent Judge Foley from making available to petitioners the Internal Revenue Manuals. *United States* v. *Honorable James T. Foley,* 283 F. 2d 582 (2nd Cir. 1960).

Evidence with respect to the difference in function between internal revenue agents and special agents was not before the courts in either *Sclafani* or *Turner.* The issue presented and arguments made here were not made in those cases. Here the record presents a clear-cut issue of law, since the government offered no proof. In *Sclafani* and *Turner* the government did offer proof, and the cases were heard on appeal after jury verdicts of guilty.

The decision of the Court of Appeals conflicts with several principles established by this court.

a. ***A Federal Agent Is Required to Obtain a Valid Search Warrant in Order to Search a Person's Home (Unless Incident to a Lawful Arrest).***

Evidence of a crime may not be taken from the person who is the subject of the investigation, except by judicial proceedings. Where there is ample opportunity to obtain a search warrant, a search and seizure without one is unlawful. *Silverman* v. *United States,* —— U. S. ——, 5 L. Ed. 2d 734, 29 U. S. L. W. 4249 (1961); *United States* v. *Jeffers,* 342 U. S. 48 (1951); *Rea* v. *United States,* supra; *Johnson* v. *United States,* 333 U. S. 10 (1948);

McDonald v. *United States*, 335 U. S. 451 (1948); *Trupiano* v. *United States*, 334 U. S. 699 (1948).

The government's answer admitted that on January 28, 1957 Revenue Agent Aiello referred the matter to the Intelligence Division, and Special Agent Howland was assigned on January 30 to conduct a fraud investigation (12a). It is conceded that Howland first visited petitioners' home on March 26, 1957. The decision to assign a special agent indicated there was sufficient information to obtain a search warrant. There was ample time to obtain one. The Court of Appeals ignored this point entirely.

b. *The Burden of Proving Consent to a Search Without a Warrant Rests on the Government.*

Courts indulge every reasonable presumption *against* waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights. *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

Since a special agent has no authority under law to examine a taxpayer's books and records or interrogate him without a search warrant or as incident to a lawful arrest, in the absence of such procedures, the examination is lawful only when the taxpayer knowingly waives his constitutional rights and consents to the search. The courts have placed *upon the government* the burden of proving "that there was a true consent," "freely and intelligently given," and that the waiver of defendant's constitutional rights was "unequivocal and specific." *United States* v. *Reckis*, 119 F. Supp. 687, 690 (D. C. Mass. 1954); *United States* v. *Gross*, 137 F. Supp. 244 (S. D. N. Y. 1955); *Judd* v. *United States*, 190 F. 2d 649 (D. C. Cir. 1951).

The District Court erred when it ruled that petitioners' witnesses failed to show that the search and seizure was unreasonable (104a). All that petitioner was required to

show was that the search and seizure was not made as an incident of arrest or pursuant to a lawful search warrant. The burden was then upon the government to show that the books were freely and voluntarily turned over to them. The burden is a heavy one.

As a matter of law, the government should have been required to put in its case to overcome the strong presumption against waiver of petitioners' constitutional rights. It was therefore error for the trial court to dismiss at the end of petitioners' case.

The Court of Appeals ignored petitioners' argument on this point.

c. *To Constitute a Waiver There Must Be an Intentional, Willful Renunciation of a Known Right.*

The inquiry into whether petitioners' disclosures to the special agent were "voluntary" is not concerned with a choice between (1) petitioners physically handing over their records to the agents, and (2) the agents seizing the records by physical force. The inquiry must be whether petitioners voluntarily waived their constitutional rights. A waiver *must* be a willful renunciation of a known right. *Johnson* v. *Zerbst*, supra; *Amos* v. *United States*, 255 U. S. 313 (1921); *Johnson* v. *United States*, 333 U. S. 10 (1948).

The determination of whether the petitioners intentionally waived their constitutional rights depends "upon the particular facts and circumstances surrounding *(this)* case, including the background, experience and conduct of" petitioners. *Johnson* v. *Zerbst*, supra.

Dr. Grant testified that it was his understanding "when the government asked for some figures in connection with my income tax I *had* to make the figures available to them" (52a). (Italics supplied.) Whenever the government went to his office and asked for something, it was Dr. Grant's

understanding that was a "directive." He and his employees got the information as quick as they could (53a, 84a-86a). Judge Foley commented that he did just what every citizen usually does (86a).

The Court of Appeals stated "The disclosures here were apparently quite willing, although possibly in ignorance of rights" (31). The principle is applicable here that consent to examine petitioners' records "was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." *Johnson* v. *Zerbst*, supra, p. 13.

The Court of Appeals' assertion that there was no "search" because petitioners or their employees handed the books to the special agent instead of the agent forcibly seizing them begs the issue (32). Where federal agents obtain admission to private premises in the name of the law, evidence received from the owner under investigation for a crime is considered obtained by a "search" within the meaning of the Constitution. *Amos* v. *United States*, 255 U. S. 313 (1921); *Johnson* v. *United States*, 333 U. S. 10 (1948).

Likewise, the suggestion that the failure of the petitioner to claim constitutional privileges when the revenue agent first requested the records might be construed as a "waiver", also begs the question. This is the very issue which the Court should review—whether every taxpayer should refuse to give every revenue agent any information by claiming his privilege against self-incrimination, in order to protect himself from his own ignorance of just when a criminal investigation has begun.

In *Sclafani* the Court of Appeals stated:

> "there is inherent in it [a 'routine' tax investigation] a warning that the government's agents will pursue

> evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission" (pp. 414-415).

The warning described by the Court may be "inherent" to a judge, a prosecutor, or most lawyers. But there is no basis for ruling that such a warning is inherent to *every* taxpayer. Dr. Grant did not understand such a warning was inherent, or that he assumed any hazards of criminal prosecution. His state of mind, background, and lack of prior experience with revenue or special agents show there was no knowledge or belief that any criminal proceeding was involved, and therefore no waiver or consent.

The courts have placed on the government the burden of proving there was a conscious, knowing, and intentional waiver of constitutional rights. The important issue is the state of mind of Dr. Grant at the time he was talking with Howland. The requirement is that the taxpayer understand he is not obligated to submit his records, and consciously waives his *known* rights.

d. *Evidence Obtained by Fraud and Deceit Must Be Suppressed.*

The decision in the instant case and in *Sclafani* are in conflict with *Gouled* v. *United States*, 255 U. S. 298 (1921). The Court of Appeals sustained the District Court's holding that "there was nothing to show any affirmative misrepresentation, fraud, deceit, or scheme to defraud" by the agents (31).

This Court should determine whether the following facts constitute such fraud and deception by the special agent as to require the suppression of the evidence he obtained:

(1) Dr. Grant believed he was obligated to show his books to the government when it demanded them, so he did

show them to Revenue Agents Solomon and Aiello, and to Special Agent Howland. He knew of no distinction between them (52a, 53a, 55a, 62a-63a, 71a, 81a-86a).

(2) Both Solomon and Aiello told Dr. Grant and his girl employee there were errors in the books, and that they were inadequate (20a, 21a, 55a). Aiello told Dr. Grant and the girl that they should have an accountant to get up a better system (22a, 55a). *This is significant.* The answer admits it (13a). The suggestion was solely that the books were inadequate, and he should have an accountant to get up a better system.

This atmosphere—that only taxes were involved, and that additional liability was possible because the books were inadequate—continued right up until June, 1959. Never was there any indication that Dr. Grant was at fault —either willfully or negligently.

(3) The record is uncontradicted that Revenue Agent Aiello told Dr. Grant Special Agent Howland was going to *help Aiello* with the audit of his taxes, and they hoped between the two of them that they could get it finished (58a, 79a).

Aiello's statement that Howland was going to help Aiello was intentionally misleading. At that moment Howland was in charge of a NEW investigation—for criminal purposes. Stating that Howland was to help Aiello was intended to and did in fact lead Dr. Grant to believe Howland's sole purpose was the same as Aiello's—to ascertain the correct civil tax liability. This was a reasonable belief, since two agents had been unable to complete the examination and a third would really help finish it.

(4) Throughout the examination Special Agent Howland repeatedly made statements with respect to the civil lia-

bility designed to deceive Dr. Grant. From time to time Dr. Grant asked how he was coming along, and why it was taking so long. Howland avoided arousing Dr. Grant's possible concern by showing a very pleasant smile, explaining that a lot of details had to be checked, and that he had other cases to work on (64a-65a). When Dr. Grant asked why he was going around checking transactions with third parties after Dr. Grant had explained everything, Howland stated it was a "routine tax thing" that they did with everybody. Howland promised to discuss his findings with Dr. Grant, but he never did (64a-68a, 83a).

(5) One fact which contributed to Dr. Grant's justified belief that the investigation was solely for civil purposes was the annual request that he sign waivers of the statute of limitations, Form 872. But when Aiello and Howland stretched the investigation in 1958—over three years, Dr. Grant returned the waivers unsigned. He wrote a letter on February 10, 1958 requesting the Internal Revenue Service to waive the interest "for this additional period if any additional assessment is made as a result of the audit" (60a, Ex. 17, 18). Dr. Grant believed he was obligated to sign the waivers, just as he was obligated to submit his records, but he thought it only fair the government should not charge him interest, when it was caused by the agents' delay (60a-61a).

It is most significant that Howland made a personal call to Dr. Grant to get him to sign the waivers. Howland told Dr. Grant that Congress had passed the law requiring the payment of interest, and nothing could be done about it. After that explanation, Dr. Grant signed the waiver.

This act of Howland in securing Dr. Grant's consent to the waivers was a deliberate act of fraud and deception. Howland handled it himself in order to deceive Dr. Grant into believing this was solely a civil audit.

(6) On September 16, 1958 another significant act of deceit occurred. Up until that time Howland had examined the books, records, etc. in Dr. Grant's office. Now Howland's problem was how to obtain copies for use in criminal proceedings. He told Dr. Grant he would like to take the log books and cancelled checks to his office in Albany so he could work on them at his leisure. Dr. Grant "dragged his feet" about complying, questioning why Howland had to go over again what the other agents had done, especially since he had already seen them in Dr. Grant's office. But since Dr. Grant felt he was obligated to surrender the records, he did so (Ex. 20, 62a-63a, 83a). Petitioners were never able to find out whether Howland did make copies, but the answer admits they were made (14a). Since such copies were made without consent, they should be suppressed as evidence. Howland kept the records from September 16, 1958 until after April 13, 1959 (118a).

The issue is not solely whether consent was obtained by *affirmative* acts of deceit by the agents. Suppression is also required where the permission to search was given by the taxpayer in the belief he was obligated to do so. This is the holding of the *Amos* case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH W. BURNS
GEORGE BOND, JR.
Attorneys for Petitioners

APPENDIX

Constitution of the United States

AMENDMENT IV

SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

* * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U. S. C. Section 7602:

§7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U. S. C. Section 7604(a):

§7604. Enforcement of summons

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

Federal Rules of Criminal Procedure, Rule 41(e):

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its

face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Internal Revenue Regulations (26 CFR §601.105):

Sec. 601.105

(b) Examination of returns.—(1) General.—The original examination of income, profits, estate, gift, excise, and employment tax returns is a primary function of internal revenue agents in the Audit Division of the office of each district director of internal revenue. Such internal revenue agents are organized in groups, each of which is under the immediate supervision of a group supervisor designated by the district director. Revenue agents and revenue officers (and such other officers or employees of the Internal Revenue Service as may be designated for this purpose by the Commissioner) are authorized to examine any books, papers, records, or memoranda bearing upon matters required to be included in Federal tax returns and to take testimony relative thereto and to administer oaths. See section 7602 of the Code and the regulations thereunder. There are two general types of audit. These are commonly called "office audit" and "field audit."

* * * * *

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 360—October Term, 1960.

(Argued April 20, 1961 Decided June 13, 1961.)

Docket No. 26785

LUTHER F. GRANT and SIRRKA V. GRANT,

Petitioners-Appellants,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

WATERMAN, MOORE and SMITH,

Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Northern District of New York, James T. Foley, *Judge*, dismissing a petition for the suppression of evidence and the return of papers, books and records. Affirmed.

JOSEPH W. BURNS, New York, N. Y. (John P. Cuddahy and Austin, Burns, Appell & Smith, New York City, George Bond, Jr., N. Earle Evans, Jr., and Bond, Schoeneck & King, Syracuse, N. Y., on the brief), *for petitioners-appellants.*

EDWARD J. MCLAUGHLIN, Asst. U. S. Attorney, Syracuse, New York (Justin J. Mahoney, U. S. Attorney, Syracuse, N. Y., on the brief), *for defendant-appellee.*

SMITH, *Circuit Judge*:

Taxpayers moved prior to indictment to suppress evidence obtained from them by Internal Revenue Agents in investigation of their income tax returns for 1952, 1953 and 1954. After hearing, the District Court relying on *Sclafani* (*United States* v. *Sclafani*, 2 Cir. 1959, 265 F. 2d 408, cert. denied 360 U. S. 918), denied relief for failure to show any affirmative misrepresentation, fraud, deceit or some scheme to mislead. See also two prior decisions on procedural issues in this case. 282 F. 2d 165, 283 F. 2d 582.

The investigation and audit of Dr. Grant's income tax returns for the year 1953 were originally undertaken on May 26, 1955 by Internal Revenue Agent Morris S. Solomon. After Solomon's resignation, the audit was reassigned in January 1956 to Internal Revenue Agent A. R. Aiello, and was later expanded to include 1952 and 1954. During the course of the investigations, waivers were obtained from Dr. Grant and his wife from time to time in order to toll the running of the statute of limitations. On the third occasion, Dr. Grant requested a waiver of interest, but when told that could not be granted, signed the waivers anyway. On January 30, 1957 Special Agent Howland of the Intelligence Division entered the case to determine whether fraud was involved. He was introduced to Dr. Grant as a special agent. Thereafter the investigation was joint, the Audit Division and the Intelligence Division cooperating under the direction of the Intelligence Division. Log books of Dr. Grant for the years 1952-54 and cancelled checks on

two banks for the same years were turned over by Dr. Grant or by his employees on his instructions to Special Agent Howland on September 16, 1958 and returned November 19, 1958. Checks of Dr. Vuornos (Mrs. Grant) for the same years were turned over to Howland on January 15, 1959. Howland signed a receipt on September 16, 1958 as "Special Agent, Intelligence Division." This receipt was given to Dr. Grant, according to Mrs. Zalkauskas. On April 13, 1959 Dr. Grant wrote to Howland as "Special Agent, Intelligence Division." By letter of June 3, 1959 Dr. Grant was advised that criminal proceedings against him were being considered. He testified that this development was a surprise and shock to him. He also testified that the records had been turned over under the impression that it was his duty to do so.

No summons had been issued and the only written demand for records was in the letter of the Internal Revenue Agent in the early, civil, stage of the investigation, calling upon the taxpayer to have all books and records available for examination. There is no evidence that reference was made to the statute, Section 7602 of the Internal Revenue Code of 1954. Apparently petitioners contend that a remark of Howland's, which as Dr. Grant recalled it, was "Now, you don't have to give me this information, but we can get it anyway," amounted to an illegal demand for self-incrimination. It may be, however, that the special agent was attempting to inform the taxpayer of his right to withhold information now that the investigation had shifted from audit of civil liability to search for evidence of fraud. It would of course be far preferable, so that it may be made certain that the choice of the taxpayer be an informed choice, that written warning be given when the civil audit is suspended as such, and the investigation becomes one to determine whether criminal or civil fraud penalties should be sought by the government. This would not only

protect the taxpayer's constitutional rights, but also obviate much of the delay in tax cases caused by such motions as the one before us.

Two questions were raised by petitioners, compulsory self-incrimination in violation of the Fifth Amendment, and unreasonable search and seizure in violation of the Fourth Amendment. The court found that there was nothing to show any affirmative misrepresentation, fraud, deceit, or scheme to defraud, and dismissed the petition to suppress the evidence. On the showing made here, this finding was clearly correct.

The disclosures here were apparently quite willing, although possibly in ignorance of rights. Even the possible ignorance of rights is highly doubtful in view of the special agent's statement that petitioner did not have to give the information, and of petitioner's admission, R. p. 163, that Henry Solomon may have told him in 1958—and he had talked with Henry Solomon prior to April 15, 1958—that what they were trying to do was put him in jail. To be sure, he later testified on redirect that his memory was refreshed by a Medical Economics Journal shown him by his counsel, which led him to place the date after February 29, 1960. There is no evidence that any search was made by the agents. The records taken were produced on request, either by the taxpayer personally, or by employees of the taxpayer under taxpayer's instructions.

Petitioner differentiates this case from *Sclafani* in that here proof was adduced of the distinct nature and function of the Special Agent and of the criminal investigation aspect which the case took after his entry into the picture. This of itself is not sufficient to change the result here, cf. *Turner* v. *United States*, 4 Cir. 1955, 222 F. 2d 926, although it may be a factor in determining whether the records were obtained by fraud. *United States* v. *Wolrich*, 129 F. Supp. 528, S. D. N. Y. 1955.

One difficulty with the claim that entry into the criminal investigation makes production of records thereafter compulsory self-incrimination is that the privilege does not first arise at that time, but exists in the earlier civil audit stage of the investigation, and if not claimed, must be considered "waived" as to material then produced. Strictly speaking, of course, there is seldom any true waiver, for at the inception of the civil audit criminal proceedings are not under active consideration by either agent or taxpayer. If the disclosure is voluntary, however, the records turned over in the civil audit may be used without restriction. The situation was materially different during the period ending in 1952, when the practice of a grant of immunity for voluntary disclosure was the motive for the production of records. In cases arising during that period, the issue was whether the voluntary turnover antedated the beginning of the investigation.

Our attention has not been called to any federal or state precedent in other fields for a requirement of warning of possible prosecution on a request by criminal investigators for information prior to appearance before a committing magistrate, so long as no coercion is claimed. *Wilson* v. *United States*, 162 U. S. 613, *Turner* v. *United States*, *supra*, at 931.

Since there was no search established, and no compulsion could well be found on the showing made, we do not have plainly presented any question of waiver of the constitutional prohibitions against unreasonable search or against compulsory self incrimination. On a more complete showing at the trial the picture may, of course, be substantially changed. The judgment dismissing the petition is affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of June one thousand nine hundred and sixty-one.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,

Circuit Judges.

LUTHER F. GRANT and SIRRKA V. GRANT,

Petitioner-Appellants,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk